SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CHRIS BENEDICT, R.A.,

Index No. 155767/2014

Plaintiff,

-against-

DECISION/ORDER

ROBERT COHEN,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, breach of contract, plaintiff Chris Benedict, R.A., ("plaintiff") moves pursuant to CPLR §3212 for summary judgment dismissing the sole, breach of contract counterclaim of defendant Robert Cohen ("defendant"), and pursuant to CPLR §3212(e) for partial summary judgment with respect to the contract alleged in the counterclaim relating to "Synapse Capital."

Factual Background

By its complaint, plaintiff, an architectural services firm owned by Chris Benedict ("Ms. Benedict"), alleges that in December, 2012, plaintiff appointed defendant to act as plaintiff's representative pursuant to an "oral agreement" in order for defendant to "increase the profitability" of plaintiff's business (the "Representative Agreement") (¶¶14-15). Defendant's duties included bringing in new architectural projects at 12% and 14% of the construction costs instead of the 7% customarily charged by plaintiff, serving as a liaison between plaintiff and clients, and making cold calls (¶15). Ms. Benedict gave defendant access to her Yahoo Small Business account domain "chrisbenedictra.com" to establish email accounts for her and the employees. Defendant was to receive 10% of the gross revenue earnings from new accounts he

generated. The amount of the commission was later set forth in a letter dated July 27, 2013 (the "Letter Agreement").

In February 8, 2013, defendant moved the domain name of "chrisbenedictra.com" from plaintiff's Yahoo Small Business account to a website company he previously used, "1&1," to set up the employee email accounts.

In March 28, 2013, through one of Ms. Benedict's contacts, Synapse Capital ("Synapse") was referred to plaintiff for a potential project in New York City (the "Synapse Project"). Ms. Benedict contacted Synapse, and then assigned defendant to negotiate the deal. Defendant obtained an offer for plaintiff to receive 7% of constructions costs, which was insufficient to cover costs and defendant's commission. Thus, Ms. Benedict rejected the proposal, negotiated with Synapse herself, and secured a contract for the Synapse Project at 10% of construction costs. Ms. Benedict then directed defendant to refrain from engaging with Synapse as he was endangering the relationship between Synapse and Ms. Benedict.

By June 2013, defendant performed no cold calls, found no new clients, marketed and represented the company poorly, alienated clients and potential clients, and did not deliver fee proposals of 12-14% of the construction cost. Without authority or legal justification, defendant also converted the domain names and email accounts for his own benefit and use, and blocked access from plaintiff and its staff for one month. Defendant closed the domain accounts, thereby deleting almost 8 years of emails from Ms. Benedict's account and 5 months' worth of emails from the staffs' accounts. Plaintiff's employees were unable to receive important e-mails from its clients and vendors as well as send invoices under plaintiff's domain.

On January 8, 2014, defendant brought a small claims action against plaintiff to recover

commissions as to the Synapse Project. Defendant subpoenaed certain individuals of Synapse, their business associates, and their investors, in order to put pressure on Benedict to pay defendant.

Plaintiff alleges that defendant's failure to perform his duties and his interference with the plaintiff's attempts to obtain business, along with his wrongful taking of plaintiff's e-mails accounts and deletion of e-mails constitute a breach of the Letter Agreement. Defendant negotiated a lower proposal amount in an effort to secure a contract quickly and collect a commission irrespective of the negative financial impact the proposal would have on plaintiff. Plaintiff also alleges that defendant wrongfully attempted to interfere with plaintiff's contractual relationships with its client, Synapse, regarding the Synapse Project. Defendant's actions constitute a breach of the implied covenant of good faith and fair dealing. Moreover, defendant read private email correspondences between Ms. Benedict and her clients, including Synapse, as evidenced by his uninvited appearance at a location where he thought a business meeting would be held between Benedict and Synapse. Defendant's wrongful takeover of the domain names and e-mail accounts from the Plaintiff constitutes conversion.

In its Answer, defendant alleges that he worked full time as an independent contractor for Ms. Benedict and her partner/employee, Henry Gifford ("Gifford"), from January 2013 through June 2013 based on their promises to pay him commissions and make him equal partnership in a new firm to be formed by the three of them. Prior to the Letter Agreement, defendant, Ms. Benedict and Gifford entered into an agreement in March 2013 for defendant to be paid a 10% commission of all revenues Ms. Benedict received from Synapse if Synapse hired Benedict to design apartment buildings for them. From March 2013 through September 2013, defendant

used his expertise in conducting numerous meetings and discussions and presentations with Synapse to move the deal along. Synapse hired plaintiff to design 5-7 new residential, market rate, passive house certified apartment buildings based upon defendant's efforts and work. The first project was at 542 West 153rd Street, in New York City, the second project was at 87 Newkirk Street, Jersey City, New Jersey, and projects 3-7 are at sites yet to be determined. In September 2013, Ms. Benedict and Gifford severed all communications with defendant, and Ms. Benedict told defendant that plaintiff did not owe him anything for obtaining Synapse as a client.

Defendant also alleges that in April 2013 he, Gifford and Ms. Benedict entered into an oral agreement for defendant to be paid a $10,000 commission and for them to form a new business partnership "State Carbon LLC" if Cohen delivered a contract for consulting services for $35,000.00 from a new client, 645 West End Avenue. This oral agreement was confirmed between defendant, Gifford and Ms. Benedict in June 2013, before they were notified on June 19, 2013 that they had won the contract with 645 West End Avenue (the "WEA Contract").

However, Ms. Benedict only paid defendant $2,142.86 for commissions on the WEA Contract. In addition, Ms. Benedict has refused to enter into the State Carbon LLC partnership with defendant. Defendant alleges that Ms. Benedict owes him $7,857.14 for securing the WEA Contract, and $2,877.12 in expenses he incurred in forming and subsequently dissolving State Carbon LLC which she previously promised to pay.

In support of dismissal of defendant's breach of contract counterclaim, plaintiff argues that there was no valid, binding agreement between the parties. Defendant denied all of plaintiff's allegations concerning the parties' Letter Agreement, and defendant's deposition demonstrates that there was no meeting of the minds between the parties, and that defendant had

no defined duties under the Letter Agreement so as to satisfy the requirements that a contract contain both essential and definite terms. The alleged partnership claim also fails as there are no allegations of the sharing of losses. And, because the various partnership plans and projects could not be accomplished in one year, such plans, which were not in writing, violate the Statute of Frauds. Further, defendant's claim for commissions related to the Synapse Project fails because he fails to allege any consideration to support his entitlement to commissions, and defendant cannot point to any express writing of past consideration to support his claim. Since the Letter Agreement is vague and does not set forth any consideration, any promise derived from past consideration is not actionable. And, the portion of the Letter Agreement stating that the parties will mutually agree on future projects is also unenforceable.

In opposition, defendant argues that plaintiff failed to submit any affidavit of fact to support his *prima facie* burden on summary judgment, and plaintiff's affidavit adopting the assertions of counsel, is insufficient. The depositions demonstrate that the parties had a meeting of the minds to pay defendant commissions for projects he brought to plaintiff, he was in fact paid for some projects he helped bring to plaintiff, and there has been partial and full performance under the various individual projects. Plaintiff's admission to the commission agreement between the parties falls within the exception to the Statute of Frauds. The e-mails between the parties evidence the terms of the agreement in compliance with the Statute of Frauds. The Letter Agreement is labeled a commission agreement, and defendant fulfilled his duties while working with plaintiff. There is no proof that the individual projects could not be performed within one year. Commission was not based on time to construct a building, but on defendant procuring a client. And, no writing is needed if full performance within one year is

possible, and since full performance has been completed, the exception to the Statute of Fraud applies. The stand-alone Letter Agreement is not based on any past consideration, and is valid. Parol evidence of the surrounding circumstances existing at the time the parties entered the Letter Agreement is admissible to clear up any ambiguity in the contract language. The Letter Agreement's reference to "our agreement" can refer to the on-going relationship between plaintiff and defendant. And, the agreement to participate in future joint ventures is more than an "agreement to agree." In any event, an issue of fact exists as to whether defendant should recover his damages under *quantum meruit*.

In reply, plaintiff argues that Ms. Benedict's affidavit sufficiently states that the parties had no meeting of the minds, and defendant failed to plead any allegation of meaningful work he performed on the Synapse Project to support a *quantum meruit* claim.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are

insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]).

To establish a breach of contract claim, plaintiff is required to show the existence of a valid contract, performance by the plaintiff, breach of the contract by defendant and resulting damages (*see The Princeridge Group LLC v. Henning-Carey Proprietary Trading, LLC*, 2014 WL 6879924 [Sup Ct NY Cty 2014]; *Flomenbaum v New York Univ.*, 71 AD3d 80, 890 NYS2d 493 [1st Dept 2009]). "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, *consideration*, mutual assent, and *an intent to be bound* (*Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 8 N.Y.S.3d 1 [1st Dept 2015] *citing* 22 N.Y. Jur. 2d, Contracts § 9) (emphasis added)). "That meeting of the minds must include agreement on all essential terms (id. at 31, 599 N.Y.S.2d 804, 616 N.E.2d 159)" (*Kolchins*, 128 A.D.3d at 59, *citing Kowalchuk v. Stroup*, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43 [1st Dept 2009]). "In determining the existence of a valid contract, we begin with the examination of the communications between the parties" (*id.*).

At the outset, it cannot be said that plaintiff's motion for summary judgment is procedurally defective. Ms. Benedict's affidavit expressly "incorporate[s] all allegations set forth in Plaintiffs Complaint" (¶2), and the attorney affirmation may be used to introduce deposition transcripts (*see Olan v Farrell Lines, Inc.*, 64 NY2d 1092, 1092 [1985] ("The fact that defendant's supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment"); *see Kapilevich v City of New York*, 103 AD3d 548, 960 NYS2d 39 [1st Dept 2013]; *Hoeffner v Orrick, Herrington*

& Sutcliff LLP, 61 AD3d 614 [1st Dept 2009]).

As plaintiff points out, defendant's allegations of a partnership relationship between plaintiff and defendant fail, as there is no evidence in the record concerning the intent of the parties in this regard, or that the parties shared joint control in the management of the business, shared profits and losses, or as to any capital contribution made by defendant. It is noted that the counterclaim does not seek damages based on any partnership or joint venture, but premises all damages upon the Letter Agreement to pay him 10% of the Synapse Projects and an oral agreement to pay him 10% relating to securing the WEA Contract. Nevertheless, to the extent that defendant alleges that plaintiff induced him to work full time as a "partner" with the promise of payment of commissions and to be made equal partner, the record fails to establish any of the elements of a partnership.

However, as to plaintiff's contention that defendant cannot establish a meeting of the minds as to defendant's role to assist the company so as to support his breach of contract counterclaim, the Court notes that the counterclaim is based on an alleged "specific agreement for" defendant to be paid 10% commission of "all revenues" plaintiff received from the Synapse Project for his "lead role in working to bring in Synapse as a new client for [Ms.] Benedict." (¶ 29). The Answer also cites to the Letter Agreement signed by plaintiff and defendant, to which plaintiff's complaint *also* cites, which memorializes defendant's commission related to the Synapse Project. Although the Letter Agreement, *does not state defendant's obligations*, an essential term (*F & K Supply Inc. v. Willowbrook Development Co.*, 288 A.D.2d 713, 732 N.Y.S.2d 734 [3d Dept 2001] ("as the terms at issue concern the consideration for this agreement, the obligations assumed by the parties pursuant to the agreement and what parties are

bound by the agreement, it could not be credibly argued that the terms are not material)), signed and unsigned writings relating to the same transaction and containing all the essential terms of a contract may be read together to evidence a binding contract *(Weiner & Co. v. Teitelbaum*, 107 A.D.2d 583, 483 N.Y.S.2d 313 [1st Dept 1985]; *see American Linen Supply Co., Inc. v. Penn Yan Marine Mfg. Corp.*, 172 A.D.2d 1007, 569 N.Y.S.2d 267 [4th Dept 1991]). Here, the emails submitted by defendant indicate that "Robert [defendant] is in the process of implementing and will own responsibility for" "systems" "so we can grow as a company" and email lists numerous categories of "systems," such as lead management and "Close new business/negotiate terms and get contracts signed . . . . (email dated January 12, 2013). A different email dated February 22, 2103 states that "I [defendant] am responsible for and will conduct all business" for plaintiff for a "10% commission on a per deal basis.." And, a July 23, 2013 email from plaintiff to defendant "Regarding Synapse- you will receive your 10% commission if we sign an architectural contract with them, you are to consult fully with Henry and I on all correspondence with Synapse." And, while defendant denies many of plaintiff's allegations in the Complaint,[1] defendant, nevertheless by his Answer, asserts that he "worked diligently" to secure Synapse as a new client (Answer, ¶30). Plaintiff's reliance on defendant's deposition testimony wherein he stated that his role was "Whatever it takes to get the business done right and make profit" and that the parties "never had

[1] Plaintiff's Complaint alleges the existence of two agreements: (1) the Representative Agreement under which defendant's various duties were defined essentially as bringing in new architectural projects and acting as a liaison on those projects, and (2) the Letter Agreement "Re: Synapse Capital Sales Commission Agreement" memorializing the amount of which defendant was to be compensated, *i.e.*, a 10% commission of proceeds plaintiff or Gifford received "pursuant to any business" plaintiff or Gifford "engages in with Synapse Capital . . . ." However, in his Answer, defendant agrees that the Letter Agreement memorialized his commission of 10% "for all transactions completed with Synapse" (¶32), but *denies* all of plaintiff's allegations of his duties under the *Representative Agreement* (see Answer ¶¶4, 6), and thus, denies any obligation on his part to act as an "appointed" representative of plaintiff, any obligation to "bring in a new project every three weeks," or "work out of the Plaintiff's office making cold calls every day," or "bring in fees amounting to between 12% to 14% of the construction cost." (Complaint, ¶¶5, 14).

a chance to describe" his duties is insufficient to demonstrate, as a matter of law, that the parties did not have a meeting of the minds as to defendant's role in the company. Defendant testified that he was to "conduct[] himself in a business development sales fashion to do everything possible to have" Synapse hire plaintiff "to design their building . . . I had to do a lot of things. Meetings, phone calls, lunches, tours, site visits, proposals." (EBT, pp. 113-114). Whether defendant performed his duties to plaintiff's satisfaction is inconsequential to the analysis of whether there was a meeting of the minds as to defendant's duties under the Agreement. As such, dismissal of the counterclaim on this ground is unwarranted.

Consequently, and based on the above, plaintiff's contention that the Letter Agreement is unenforceable due to its failure to expressly state the essential term of defendant's role in the company is insufficient to warrant dismissal of the counterclaim.

Nor can it be said that the Letter Agreement failed to meet the definiteness requirement to establish an enforceable agreement. "[A] court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*Matter of 166 Mamaroneck Ave. Corp. v. 151 East Post Rd. Corp.*, 78 N.Y.2d 88, 91, 571 N.Y.S.2d 686, 575 N.E.2d 104 [1991]). However, [s]triking down a contract as indefinite and in essence meaningless is at best a last resort" (*id.*, at 91)). "Where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain" (*Aiello v. Burns Intern. Sec. Services Corp.*, 110 A.D.3d 234, 973 N.Y.S.2d 88 [1st Dept 2013] *citing Matter of 166 Mamaroneck Ave. Corp.*, 78 N.Y.2d at 91; *Edelman v. Poster*, 72 A.D.3d 182, 186, 894 N.Y.S.2d 398 [1st Dept. 2010]; *Marshall Granger & Co., CPA's, P.C. v. Sanossian & Sardis, LLP*, 15 A.D.3d 631, 632, 792 N.Y.S.2d 498 [2d

Dept. 2005]).

Here, the Letter Agreement, notably dated in July 2013, coupled with the emails previously exchanged, and deposition of defendant, support defendant's claim that his compensation was premised upon his lead role in securing the Synapse Project for plaintiff, and is thus sufficiently specific to evidence the parties' intent to be bound to pay defendant for "any business plaintiff engages in with Synapse" (*see Aiello v. Burns Intern. Sec. Services Corp.*, 110 A.D.3d 234, 973 N.Y.S.2d 88 [1st Dept 2013] (finding contract that identified the parties, "the subject matter of the agreement (security services)," and the price to be paid sufficiently specific to be enforceable; "memorialization of the *details* of the security service was not an indispensable prerequisite to the performance of the contract, as evidenced by the fact that neither side took any step to raise the issue once the security services . . . were implemented")).

And, contrary to plaintiff's contention, the Letter Agreement is not rendered unenforceable for failure to include any consideration. "Extrinsic evidence is permissible for the purpose of sustaining a contract which is attacked on the ground of want of consideration" (*I. & I. Holding Corp. v. Gainsburg*, 251 A.D. 550, 296 N.Y.S. 752 [1st Dept 1937]). Further, it has been held that "parol evidence is admissible both for the purpose of demonstrating the existence of a consideration for the promise embodied in a [written] pledge and to show the acts of the promisee which had been performed in reliance thereon" (*Liberty Maimonides Hospital v. Felberg*, 4 Misc.2d 291p, 158 N.Y.S.2d 913 [Supreme Court, Sullivan County 1957]). Defendant does not rely on any "past consideration" to support the Letter Agreement. And, the extrinsic evidence noted above sufficiently supports defendant's claim that plaintiff's agreement to pay him commissions pursuant to the Letter Agreement is supported by his obligations to take

a lead role in procuring the Synapse Projects.

Further, the Letter Agreement coupled with the emails noted above, sufficiently satisfy the Statute of Frauds. Pursuant to the Statute of Frauds, GOL § 5-701(a)(1)[2] "a service contract of indefinite duration, in which one party agrees to procure customers or accounts or orders on behalf of the second party, is not by its terms performable within a year—and hence must be in writing ... since performance is dependent, not upon the will of the parties to the contract, but upon that of a third party" (*Esther Creative Group, LLC v. Gabel*, 25 Misc.3d 1219(A), 901 N.Y.S.2d 906 [Supreme Court, New York County 2009]). However, GOL § 5-701(b)(3)(a) provides:

> There is sufficient evidence that a contract has been made if:
>
> (a) There is evidence of electronic communication (including, without limitation, the recording of a telephone call or the tangible written text produced by computer retrieval), admissible in evidence under the laws of this state, sufficient to indicate that in such communication a contract was made between the parties; . . . .

Thus, written statements, emails and checks may satisfy the statute's writing requirement (*id. citing Nausch v. Aon Corp.*, 2 AD3d 101, 102 [1st Dept 2003] ["memoranda need not be in one document, but may be pieced together from separate writings if they can be shown to be related to the transaction"]). As noted above, in light of the Letter Agreement and emails, dismissal based on the alleged violation of the Statute of Frauds is unwarranted.

And, to the extent plaintiff opposes recovery under a *quantum meruit* theory on the ground that defendant did not pled or demonstration that he performed any meaningful work on

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[2] GOL § 5-701(a)(1) provides:
a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
1. By its terms is not to be performed within one year from the making thereof . . . .

the Synapse Project, the record indicates that defendant's Answer expressly claims that from March 2013 through September 2013, he conducted numerous meetings and discussions and presentations with Synapse "to move the deal along." And, at his deposition, defendant testified that "meetings, phone calls, lunches, tours, site visits, proposals" were "All the things that I did do." (Pp. 113-114) (*see Esther Creative Group, LLC v. Gabel*, 25 Misc.3d 1219(A), 901 N.Y.S.2d 906 [Supreme Court, New York County 2009] ("quantum meruit claim survives as an alternative basis for relief in the event that there was no enforceable agreement between the parties")).

The above analysis applies with equal force to the alleged breach of WEA Contract counterclaim.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR §3212 for summary judgment dismissing defendant's breach of contract counterclaim, and pursuant to CPLR §3212(e) for partial summary judgment with respect to the contract alleged in the counterclaim relating to "Synapse Capital" is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 15, 2016

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.